Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HEDWIG R. SCHULZ a/k/a
HEDY SCHULZ,
Petitioner,

vs.

CITY OF VERNON, PAUL HAWKINS,
Individually and as Agent,
Servant and Employee for the
CITY OF VERNON and MARSHALL PYLANT
Individually and as Agent, Servant and
Employee for the CITY OF VERNON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Is the Court still required to view all of the evidence in the light most favorable to the party opposed to the motion for summary judgment?

2. Has the standard of review of a summary judgment placed the Court in place of the jury and permit the Court to disregard any evidence it chooses and attempt to weigh credibility via affidavit?

3. Did the lower court err by viewing the evidence submitted in the light most favorable to the movant?

4. Did the lower courts err by disregarding the non-movants evidence in reviewing the motion for summary judgment?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on January 12, 1995.

OPINIONS BELOW

The decision of the District Court is not reported. The decision of the Court of Appeals was not published per local rule 47.5. Both decisions are contained in the attached Appendix.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on January 12, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Age Discrimination in Employment Act of 1967 (ADEA) 81 Stat 602, as amended, 29 U.S.C. § 621 et seq. [29 U.S.C. §§ 621 et seq.]

ADEA prohibits discrimination in employment because of the employee's age.

STATEMENT OF THE CASE

This is an age discrimination case involving a then sixty-six (66) year old secretary who had been an employee of the City of Vernon, Texas, for just under eleven (11) years.

In Schulz's Response to Defendant's Motion for Summary Judgment she identified 16 areas setting forth facts with references to the record in each instance which supported Plaintiff's claim of intentional age discrimination.

1. The sending of letters to Plaintiff asking her to designate her beneficiaries on her retirement. (See Affidavit of Paul Hawkins at p. 27 lines 3-4)

2. The asking of Plaintiff in January, 1990 about her retirement plans. (See Affidavit of Paul Hawkins at pp. 5-6)

3. The negative attitude expressed about her joking answer. (See Affidavit of Paul Hawkins at p. 5 last paragraph)

4. The decision to insist that Plaintiff had to tell the City her retirement plans in January, 1990 at the second meeting about Plaintiff's retirement plans. (See Affidavit of Paul Hawkins at p. 6 top paragraph)

5. The decision of Paul Hawkins to discuss retirement with Plaintiff in April, 1990 and to tell her that she could be disciplined or dismissed in the same conversation.

(See Affidavit of Paul Hawkins at p. 16 middle paragraph)

6. The decision of Paul Hawkins to discuss retirement with Plaintiff in May, 1990. (See Affidavit of Paul Hawkins at p. 22 last paragraph)

7. The fact that Plaintiff was left to do both her job and the other warehouse secretary's job without any additional help, except for purchasing orders and paying bills, while at the same time the secretarial duties of her supervisor were added and the vehicle maintenance record preparation was added for a period of approximately six weeks in March and April of 1990. (See Affidavit of Hedy Schulz at p. 2)

8. Not telling Plaintiff that she is alleged to have made errors in the water department records and the vehicle maintenance records, and then sending her on May 4 to do a job which primarily did the same thing with inputting numerical data. (See Affidavit of Paul Hawkins at pp. 17-18 and Affidavit of Hedy Schulz at p. 3)

9. The fact that the May job on the water department computer was only going to last three months. (See Affidavit of Hedy Schulz at p. 3)

10. The fact that Plaintiff did not have computer experience of any significance. (See Affidavit of Hedy Schulz at p. 3)

11. The fact that Plaintiff's job was the only reduction in force which caused a layoff of an existing employee when the decision was made in July/August to eliminate Plaintiff's job. (See Affidavit of Paul Hawkins

at pp. 2-4 and Affidavit of Hedy Schulz at p. 4 lines 1-5)

12. The fact that Plaintiff was yelled at her by her supervisor. (See Affidavit of Marshall Pylant at p. 5, lines 2-3 and Affidavit of Hedy Schulz at p. 4, lines 6-7)

13. The fact that Plaintiff was made to turn in her keys. (See Affidavit of Hedy Schulz at p. 4, lines 8-12)

14. The fact that Plaintiff was humiliated by having her secretarial tools removed in the presence of her fellow employees. (See Affidavit of Hedy Schulz at p. 4, lines 13-19)

15. The fact that Plaintiff received retirement documents to fill out from the City in September of 1990 which she did not personally solicit. (See Affidavit of Hedy Schulz at p. 5)

16. The fact that the significantly younger secretary with less seniority was retained in Plaintiff's co-employment position. (See Affidavit of Hedy Schulz at p. 2, lines 7-11)

The facts of this case if viewed in the light most favorable to Schulz can easily be viewed as proving the following:

Schulz was a good steady employee of the City who had been with the employer for ten and one-half (10 ½) years as a warehouse secretary. She was older and not well versed in some of the job skills such as computer knowledge as younger persons.

She was also slower than some of the younger employees. Also she could be crotchety and was not as eager to please and take on new tasks as her younger co-employees. Because she had reached age sixty-six (66), she could retire and draw her retirement. The City was looking to reduce its work force as gently as possible. It would be a shame to lay off a younger worker with good skills and speed when obviously Schulz only had a few more years with the City at the most. Also, the younger worker would be more economically affected whereas Schulz could begin drawing her retirement.

So began in January of 1990, a plan for Schulz to become one of those other thirteen (13) persons who retired or resigned. The only problem was that Schulz did not take the hint. At first it was just direct hints to the effect that the City just needed to know "when" she would retire. Schulz, who believed it was not really any business of her employer to commit her to a specific retirement date, tried to make light of these hints. As the Court noted, the employer was not amused.

A more direct approach was tried next. This included:

1. Giving Schulz tasks she had never done before;

2. Giving Schulz more work to do than one secretary could possibly manage and criticizing her speed and performance.

By now, it is early April, the younger worker has returned from maternity leave, Schulz's health is beginning to be affected, but she will not quit.

A new approach begins next:

1. Schulz is threatened with being fired if she lets anyone know how she is being treated - this is called insubordination and going outside the chain of command.

2. She is told she is misusing sick time and this could cost her her job.

3. She is told she must report back to work with the "right attitude" or lose her job.

4. She is told if she can't do the job she will lose her job.

5. She is sent home for three days with pay.

6. She comes back and does not retire.

A new approach (with similarities to the *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 [5th Cir. 1991] facts) is tried.

1. They start taking her job duties away from Schulz.

2. They start yelling at Schulz.

3. They take her keys to the Warehouse away.

4. They target in on the fact that entering numbers on a computer causes her stress.

5. She is again told she has a bad attitude and it has been decided that she will take Ms. Henry's job which will phase out in three months where Schulz will enter numbers on a computer all day.

6. Again she is asked if she has thought about her own retirement. She declines to retire.

7. Schulz is told her attitude is bad and she must change it.

8. Schulz comes back to her Warehouse job to her secretarial position where her typewriter, calculator and other office equipment has been removed and she is given only a pad, a pen and a telephone. (While not quite as bad as Mr. Wilson [*Wilson v. Monarch Paper, supra*] being given only a broom - the intent to embarrass and humiliate is equally present.)

It is now May 16, 1990 and Schulz has not retired. But, she is getting desperate and has sought out a City Commissioner with her complaints. For this she is placed on indefinite probation for insubordination.

It is now August 13 and still Schulz has not retired. She is then told that effective September 30, 1990 her job has been eliminated and there is no other job with the City available for her.

On approximately September 18, Schulz is given a set of retirement papers which she did not request. She fills them in and submits her retirement effective October 1, 1990.

On September 20, she files an age discrimination complaint with the EEOC.

Following the City being made aware of the age discrimination complaint, they offer Schulz a night time job as a dispatcher. Schulz declines this job. No other job is ever offered to Schulz.

The trial court in its opinion states that Plaintiff failed to produce evidence that she was qualified for many other secretarial positions or the remaining warehouse secretary job.

The trial court wholly ignored the fact that Plaintiff submitted copies of her yearly performance evaluations beginning in 1984 - 1989. Throughout this time period, Plaintiff worked as

the warehouse secretary for City. These reports were attached to the Affidavit of Plaintiff submitted as summary judgment evidence.

To summarize this evidence:

1984 Evaluation	Rated As
1. Skills	Exceeds standards
2. Knowledge and problem solving skills	Meets standards
3. Attitude	Exceeds standards
4. Dependability	Meets standards
5. Integrity	Exceeds standards
6. Learning ability	Meets standards
7. Utilization of equipment	Exceeds standards
8. Cooperation with other employees	Exceeds standards

1985 Evaluation	Rated As
1. Skills	Exceeds standards
2. Knowledge and problem solving skills	Exceeds standards
3. Attitude	Exceeds standards
4. Dependability	Meets standards

5. Integrity	Exceeds standards
6. Learning ability	Exceeds standards
7. Utilization of equipment	Exceeds standards
8. Cooperation with other employees	Exceeds standards
1986 Evaluation	Rated As
1. Skills	Exceeds standards
2. Knowledge and problem solving skills	Exceeds standards
3. Attitude	Exceeds standards
4. Dependability	Exceeds standards
5. Integrity	Exceeds standards
6. Learning ability	Exceeds standards
7. Utilization of equipment	Exceeds standards
8. Cooperation with other employees	Exceeds standards

Beginning in 1987, the form changed and it was now rated on the basis of low, medium and high on a scale of 0 - 4 with the following definitions:

0 - not observed or not applicable
1 - unsatisfactory
2 - needs improvement

3 - fully acceptable
4 - outstanding

1987 Evaluation	Rated As
1. Job knowledge	a high 3
2. Quality of work	a high 3
3. Quantity of work	a high 3
4. Dependability	a high 3
5. Attitude	a high 3
6. Safety (a rating of 4 was not available here)	a high 3
7. Punctuality and attendance	a high 3
8. Initiative	a high 3
9. Judgment	a high 3
10. Appearance (a rating of 4 was not available here)	a high 3
11. Driving habits (a rating of 4 was not available here)	a high 3
12. Trend since last evaluation	"steady"
13. Overall evaluation	a high 3

1988 Evaluation	Rated As
1. Job knowledge	a mid 3
2. Quality of work	a mid 3
3. Quantity of work	a mid 3
4. Dependability	a high 3
5. Attitude	a low 3
6. Safety (a rating of 4 was not available here)	a high 3
7. Punctuality and attendance	a high 3
8. Initiative	a mid 3
9. Judgment	a high 3
10. Appearance (a rating of 4 was not available here) (only time in six years got a rating below fully acceptable)	a high 2
11. Driving habits (a rating of 4 was not available here)	0 marked
12. Trend since last evaluation	marked as "first report"

13. Overall evaluation	a mid 3
<u>1989 Evaluation</u>	<u>Rated As</u>
1. Job knowledge	a low 3
2. Quality of work	a low 3
3. Quantity of work	a low 3
4. Dependability	a high 3
5. Attitude	a low 3
6. Safety (a rating of 4 was not available here)	a high 3
7. Punctuality and attendance	a high 3
8. Initiative	a low 3
9. Judgment	a low 2
10. Appearance (a rating of 4 was not available here) (only time in six years got a rating below fully acceptable)	a high 2
11. Driving habits	- 0 -
12. Trend since last evaluation	"steady"
13. Overall evaluation	a low 3

This last report was through January 1, 1990.

There was never another written evaluation made of Plaintiff.

The Court concluded that Plaintiff had failed to establish a prima facie case of age discrimination. (First paragraph of page 21 of Memorandum Opinion).

The criteria for establishing a prima facie case of age discrimination under the reasoning of *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973) is:

1. That she is a member of protected class (age).
2. That she was qualified for the job.
3. That she was not retained in the job - as the number of positions was reduced.
4. That the person who was retained in the remaining position (1 in this case) had less seniority and was not a member of the protected class (younger).

The Court's opinion states no prima facie case was made because no proof that Plaintiff was qualified for the job was shown but only Plaintiff's assertions that she was qualified.

The fact that for the six (6) years immediately preceding Defendant City's initial attempts to have Plaintiff retire which began in January, 1990, that Plaintiff held this very job and received good marks by her supervisors constitutes overwhelming evidence that Plaintiff was qualified for the job of warehouse secretary.

The trial court granted summary judgment and the Court of Appeals affirmed.

Schulz raised the following issue at the Court of Appeals:

> Whether the evidence indicating intentional age discrimination is sufficiently strong to require this case be remanded for trial.

The opinions of both Courts are included in the Appendix.

REASONS FOR GRANTING THE WRIT

I. THE PRESENT METHOD UTILIZED BY THE LOWER COURTS FOR SUMMARY JUDGMENT REVIEW IS DESTROYING VIABLE DISCRIMINATION CASES.

The federal courts are receiving serious criticism for their misuse of summary judgment in the context of age discrimination (Title VII discrimination). The clear reason for this is the distress that the Plaintiff's employment bar and the public in general are experiencing when they know of cases which could be easily won before a jury but are being lost in summary judgment proceedings. The perception is a denial of access to the Court to redress illegal discrimination. Such frustrations on the part of injured employees may well speak for some of the bizarre actions where former employees slaughter persons at their former place of employment and then turn the gun on themselves. The courts are a safety valve which, if perceived to not work, place all of society at risk.

This Court has repeatedly urged the lower courts to be more sparing and careful in their granting of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

II. THE METHOD OF ANALYSIS IS IMPROPER

There are two lengthy recent law review articles which address specifically the problem. These are The Recent "Respectability" of Summary Judgment and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis through the Supreme Court's Summary Judgment "Prism" 41 Cleveland State Law Review 103 (1993) and Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases 34 Boston College Law Review 203 (March 1993).

Public policy, federal statutes, and federal case law has forbidden age discrimination in employment, however, the federal courts are preventing viable cases from going to trial via the improper use of summary judgment practice.

III. THE LOWER FEDERAL COURTS NEED THE SUPREME COURT TO WRITE FURTHER ON THE SUBJECT OF SUMMARY JUDGMENT REVIEW SO THAT THE BALANCE IS RESTORED AND ONLY THOSE CASES WHICH SHOULD SUFFER SUMMARY JUDGMENT PRIOR TO TRIAL ARE ELIMINATED.

The Boston College article on Improper use of Summary Judgment does an excellent job of pointing out what has been occurring, namely:

1. courts are automatically crediting defendant's reasons
2. courts are drawing inferences in defendant's favor
3. courts are deciding witnesses credibility on paper
4. courts are requiring plaintiff's to prove their cases at the summary judgment stage.

The Supreme Court needs to accept a case where the above four problems have occurred and demonstrate what a proper analysis of the facts and application of summary judgment would be in order to correct the injustice which is occurring and guide the lower courts in addressing summary judgment in the employment discrimination context.

IV. THE CASE PRESENTLY BEFORE THE COURT IS AN EXCELLENT EXAMPLE THROUGH WHICH THE COURT COULD SPEAK.

This case would be an excellent vehicle for the court to write on. Set out in the statement of the case portion at pages five (5) through seven (7) are sixteen reasons why plaintiff should have survived summary judgment or stated another way: If Schulz had received a favorable jury verdict of age discrimination, there is the anticipated trial evidence which would sustain and uphold a favorable verdict.

A review of the trial court memorandum opinion and the unpublished opinion of the Court of Appeals totally obscures the significance of Schulz's summary judgment evidence as both courts addressed the Defendants' position and automatically credited Defendants' reasons, drew inferences in Defendants' favor and decided the credibility of witnesses on paper and required Plaintiff to prove her case at the summary judgment stage.

The facts which Plaintiff Schulz presented in response to Defendants' Motion for Summary Judgment were not included in either lower court's analysis of the case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be **GRANTED**.

Respectfully submitted,

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HEDWIG R. SCHULZ a/k/a HEDY SCHULZ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

HEDWIG R. "HEDY" SCHULZ,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	
CITY OF VERNON; PAUL HAWKINS AND MARSHALL PYLANT, INDIVIDUALLY AND AS AGENTS, SERVANTS AND EMPLOYEES OF THE CITY OF VERNON,	*	7:92-CV-107-K
	*	
Defendants.	*	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Came on this day to be considered Defendants' Motion for Summary Judgment, filed March 18, 1994. Plaintiff filed a tardy Response, by leave of Court, April 1, 1994. Defendants filed a Reply on April 4, 1994. After careful consideration of the law, the pleadings, and the arguments, the Court is of the opinion that Defendants' Motion is well-taken and should be GRANTED.

I. FACTUAL BACKGROUND

Plaintiff Hedwig R. "Hedy" Schulz ("Schulz") filed this lawsuit on September 29, 1992 claiming violations of the Age Discrimination in Employment Act (ADEA); intentional and negligent infliction of

emotional distress; and negligent hiring, retention, and supervision of employee, Marshall Pylant. She seeks exemplary and compensatory damages and attorney fees.

Plaintiff is over 40 years of age as required for protection under § 631(a) of the ADEA. She was born on January 1, 1924, making her 66 years old at the time of the incidents in question. She worked for Defendant, City of Vernon, Texas for nearly eleven years before her retirement on September 30, 1990. Plaintiff signed retirement papers on September 18, 1990, which had an effective date of September 30, 1990. Plaintiff claims that her retirement amounted to a "constructive discharge." Subsequent to the time she signed her retirement papers and before her retirement took effect, she filed a charge of discrimination with the EEOC on September 20, 1990. On September 23, 1991, the EEOC denied her discrimination claim.

The City of Vernon was in the process of downsizing its workforce, and between 1988 and 1990, thirteen jobs were eliminated or combined. Although many jobs have been eliminated, Schulz was the only employee whose position was eliminated while she was still working. For each of the other job positions eliminated by the City, the employee in that position had either retired, resigned

or died before the job was eliminated. Thus, Schulz' case was the only one in which there was a layoff of an existing employee.

Plaintiff was employed as a warehouse secretary by the City of Vernon. Although Vernon does not have written job descriptions, Schulz' duties included answering the telephone, taking customer complaints, and filling out complaint tickets; answering the base radio and dispatching trouble calls to Department Heads and/or workers; disbursing bottled water to expectant mothers; typing letter and memos when needed for Department Heads, as well as distributing the memos; discharging monthly water and sewer reports and EPA reports; working up monthly work order lists and sending them to the Commissioners; producing Water Usage Reports; keeping records of vacation and sick leave for department employees, as well as maintaining time sheets; compiling a Vehicle Maintenance Schedule; and general office work such as sorting mail and typing letters and memos.

Early in January of 1990, City Manager Paul Hawkins ("Hawkins") contacted Purchasing Agent Jerry Hamilton ("Hamilton"), Schulz' supervisor, because he had received notice that Rosa Alaniz ("Alaniz"), the other warehouse secretary, would be taking six weeks of maternity leave beginning sometime in February. Since Schulz

was eligible for retirement, they needed to know if she intended to retire during that time. This was because, if Schulz were to retire while Alaniz was on leave, they would need to train temporary help to serve as a warehouse secretary while Alaniz was on leave. Should Schulz retire, the City did not intend to replace her.

Hamilton reported to Hawkins that Schulz had stated that she was not going to tell him when she would retire and that she just might wait until Alaniz was on leave and one Monday morning not report back for work. Schulz describes this as a "joking" response. Her supervisors, however, found no humor in that response, and Hawkins told Hamilton to remind Schulz that if she intended to retire, the retirement papers should be submitted 30 days before she left, and that if she intended to just not show up for work then perhaps it would be better for her to leave now. Hamilton spoke with Schulz again, and she didn't know when she would retire.

Jerry Hamilton resigned soon after, in late January, and Marshall Pylant, who was Special Services Superintendent, took on Hamilton's previous duties including supervising the secretaries. Hawkins announced this change in supervisors to Alaniz and Schulz. His deposition reveals that Alaniz was receptive to the change in personnel, but that Schulz' only reply was, "Well, I don't intend to be

overworked." Hawkins assured her that was not his intention and remarked that he doubted she would be overworked, since she currently had a great deal of free time. So began the difficulties between Schulz and her employer.

Less than two weeks after the change in supervisors, Schulz inquired of Pylant how things were progressing. Pylant indicated that Schulz was having difficulty with the Vehicle Maintenance Report, and that it was taking her a day to a day and a half to complete it. He believed that it was not a complicated task, but that she did not want to do it. Pylant also reported that on several occasions when he had requested that Schulz type a report or complete other secretarial task, she would respond "no," "maybe," or "we'll see." This was particularly true concerning the vehicle maintenance reports.

About 3 or 4 weeks later, Pylant found errors in the maintenance reports Schulz had prepared, and he took the duty away from Schulz. He then gave the duty to one of his electricians, who was able to prepare the report accurately in no more 40-45 minutes per day. Hawkins again inquired about how Pylant was getting along with Schulz. Pylant replied that Schulz had a very bad attitude, but he was trying to work through the problem.

In March and April of 1990, Rosa Alaniz took Maternity leave.

While Alaniz was on leave, Schulz did Alaniz' duties as well as her own, except for Alaniz' duties of completing purchase orders and paying bills. Schulz claims that she was able to do these two additional duties, but did not have enough time to complete them. On April 1, the City contracted out their water delivery service to expectant mothers, because the contract saved the City money. This significantly reduced Schulz' duties.

On April 4, 1990, Schulz informed Pylant that her doctor had told her she should take two weeks off of work because of back problems. On April 11, 1990, a Wednesday, Schulz went to Hawkins' office complaining that Pylant had sent her home, and told her not to come back until Monday and that she would take the three days off without pay. She said that Pylant had told her that he had asked her to let him know when she would return from sick leave, but that she didn't remember him saying that. She said she felt well enough to return from sick leave early.

Hawkins explained that the reason Plant(sic) wanted Schulz to inform him of when she was coming back from sick leave was because, with both her and Alaniz out, they had hired a temporary secretary for two weeks and it was unfair to ask her to work for two weeks and then let her go after 7 days.

Schulz told Hawkins that Pylant was picking on he and trying to run he off by requesting her to do things that were not her job. For example, Pylant had asked her to compile Vehicle Fuel Tickets. Hawkins responded that he was the one who had suggested she do that, and that he had selected her for the duty because she had the time and because he wanted her to do it. He reminded her that she was hired to do what they wanted her to do, and not what she wanted to do. Hawkins then called Pylant and asked him to come to his office.

While they were waiting for Pylant, Hawkins reminded Schulz that going over her supervisor's head was a violation of personnel policy, and that she was expected to through the chain of command. He further told Schulz that he thought her attitude was terrible, in that she resented any changes that were made and was very negative about those changes, to the point of refusing to make those changes. He told her that every employee working for the City in recent years had undertaken new duties and had done so without complaint. Schulz replied, "Well, I can see that I'm not going to get anywhere here."

Pylant then arrived and explained that Schulz had called him the previous week and said that she might return early from

sickleave and show up for work on Wednesday. Pylant asked her to leat him know on Tuesday, so that he could let the temporary secretary know one way or the other. When she did not call by 5:00 p.m. on Tuesday, he assumed that she was going to come back the following Monday, and informed the temporary secretary that he would need her through Friday. Pylant said that when Schulz showed up for work on Wednesday, he asked why she had not called, and she replied that he never told her to call. Pylant told her to (sic) back home for the 3 remaining days without pay.

After hearing both sides of the story, Hawkins told Schulz that it was his opinion that either Schulz did not pay very close attention to what her supervisor told her or that she was directly ignoring his directives. He told her to go home for the three remaining sick days, but determined that she would be paid for those days.

The three then discussed Schulz' attitude and the problems she and Pylant were having. Pylant stated that he felt he had gone the extra mile in trying to get along with Schulz, that he did not expect anymore from her than anyone else, and that when he requested her to do something, she either said she was not going to do it, maybe she would, or that it was not her duty. In reply, Schulz stated that she was being overworked. Hawkins noted that since the City had

arranged for a local dealer to handle the bottled water arrangements for expectant mothers that her workload should have decreased significantly, and ask her how she was being overworked. She said that she answered the phone and typed reports. When ask how long it took her to type up the reports, she stated that the water and sewer reports took about one hour each per month. Schulz' deposition reveals that she had an extra hour and a half to two hours of spare time a day to perform additional tasks.[1]

Hawkins also asked Schulz about the sick leave she had been taking, and Schulz replied that she was having trouble with her sciatic nerve. She stated that this was one of the reasons that she could not do the fuel tickets, because she had to walk out to the pumps to get the readings and she felt this was a man's job. The two gas pumps were located between fifty and seventy five yards from the front door of the office where Schulz worked.

Pylant stated that he felt she could do the job as well as any

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[1]Defendant Pylant claims that Schulz had enough free time to conduct personal business during work hours, including making personal phone calls and conducting a business of selling cookware, but that she he(sic) approached her about stopping those activities, she rebuked him, stating that he, too, made personal phone calls. Pylant has also testified that, on occasion, "she would pull books and records unrelated to her job and stack them of(sic) her desk to give the appearance of being busy."

man and that she just did not want to do the task. He further stated that it took Schulz most of the day, and sometimes a day and a half, to enter the tickets in the book and tally the totals, mainly because she would not use a calculator. When Schulz had been gone, however, an employee unfamiliar with the task had been able to complete it in 42 minutes without any instructions. Schulz stated that it took her longer because she had to answer the phone.

Hawkins then told Schulz that he was concerned both about her attitude and her health problem. She stated that she was not misusing sick leave and that she could not afford to retire because she needed the health insurance the City provided for her, and could not afford to purchase it on her own. Hawkins responded that they couldn't keep her on the City payroll just because of her insurance if she didn't perform her job responsibilities.

Hawkins told Schulz that they were not trying to force her to retire nor to fire her, but that if she wanted to continue working for City she must perform her job. He reiterated that he wanted to see an attitude adjustment from Schulz, and told her to report back Monday with the right attitude.

During the third week of April Pylant reported to Hawkins that he was still having problems with Schulz. He reported that Schulz

had shown a better attitude her first couple of days back from sick leave, but now when he requested her to do something, she would reply, "we'll see," or "maybe." He also reported that she had made numerous mistakes in the vehicle records. Hawkins told him to take Schulz off of the vehicle fuel and maintenance schedules because they could not afford the mistakes.

Around the same time, Hawkins spoke to Dale Havins ("Havins"), the Water Superintendent, who informed him that Schulz had been transposing numbers in the water reports, making them incorrect. Subsequently, this duty was taken from Schulz as well. Schulz went to Havins to make her own investigation and was never able to discover that the reports had been done incorrectly by her. In the years that she had been doing the reports, she had never been told that she had done them incorrectly.

Being removed from so many job duties alarmed Schulz. In her deposition testimony, she describes Pylant's involvement in this process: "he would ask what I'm doing, because he didn't know what my work involved and I would tell him a few days later, why, I was minus that work. And that's when I saw what was really going on."

On May 4, Hawkins discussed with the Assistant City

Attorney, Kent Hudson ("Hudson"), how the City was going to operate the Utility Collections Office after May 31, 1990 when Hazel Henry ("Henry") was set to retire. Henry was responsible for entering meter readings into a computer. Although there was a plan to propose the purchase of an automated meter reading system, they would need someone to perform Henry's duties until that time. They thought there would be about a three month transitional period before the purchase of the automated system.

Hawkins thought that Schulz might do well in this position. Hawkins called Pylant and Hudson and asked them if they thought that Schulz could do the job, since she had previously worked with the meter books and had at one time checked all meter readings. All three felt that Schulz would be capable of performing the job, and that her success would depend on her attitude. They also agreed that perhaps Schulz would be happier at City Hall since she obviously resented Pylant. On Friday, Pylant told Schulz that she should report to City Hall on Monday, where she would be under the supervision of Hudson.

On Monday morning Schulz instead went to see Hawkins and said, "If you all are trying to get rid of me, why don't you just fire me?" She said that Pylant had waited until 4:45 on Friday to tell her

to report to City Hall, and that when she questioned him, he started yelling at her[2] and took her keys away from her.[3]

Hawkins told Schulz that they were not trying to fire her or run her off. He explained that by placing Schulz in the position at City Hall, they would not have to hire additional help. He also told her that she was a logical choice for the job because of her previous work with the meter books. Additionally, since Alaniz had returned from maternity leave, they could spare her at the Warehouse. Schulz agreed to try the City Hall job, but stated that she did not like it because Pylant had waited until the last minute to tell her.

Two days later, Schulz returned to Hawkins office and stated that she just did not think she could do the work they were asking her to do. She said that sitting in a chair all day made her sciatic nerve act up and she couldn't sleep at night because of the stress the City Hall job was creating.[4] It did not seem worth it to be under such

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[2]Pylant admits yelling at Schulz on two occasions: this one and another time, when he alleges that she refused to do a task which was assigned to her.

[3]Pylant's affidavit states that when he told her that she would be going to City Hall, he asked her for her Warehouse keys, but Schulz refused, saying that she might come back to the Warehouse on Monday.

[4]Plaintiff has described the experience as torture.

pressure for a job that would only last for three months. She asked if she could have a week off for vacation and then go back to work at the Warehouse. Hawkins asked why entering the numbers on the computer caused her stress when it was really not different from operating a calculator, but Schulz said it was different and she couldn't do it.

Hawkins reluctantly agreed to let Schulz take vacation time and return to the Warehouse job. He again chastised her for her bad attitude and told her that if she was determined not to learn the small amount of work at City Hall, then she was wasting her time and theirs. He informed her that now they would have to hire a temporary worker, which would be a burden on the City, since it should not be necessary or(sic) them to hire extra help. Schulz suggested that Hawkins make Henry stay on at City Hall. But, Hawkins informed Schulz that when an employee has worked for 28 years and is eligible to retire and files for retirement to begin on a certain date, you do not tell her she has to continue working.

Hawkins then asked Schulz if she had thought about her own retirement. She said she could not retire because she could not afford the insurance. Hawkins said that one of the reasons they had moved her to City Hall was that they were trying to keep her busy to

earn her pay. He also told her that when she retired they would not hire anyone to replace her, since one secretary at the Warehouse was all that was needed.

Hawkins then told Schulz that he wanted a change in her attitude. He cited examples of situations where he had stated that he wanted things done a certain way and found out later that she had refused to do the work as he had requested. He informed her that there were two things she could be fired for: saying "no," "maybe," or "we'll see," to any request made of her or continuing to violate personnel policy by bypassing her supervisor or Hawkins himself.[5]

When Schulz returned to the Warehouse to her secretarial position, her typewriter, calculator, and other office equipment had been removed. She was given only a pad, a pen, a telephone and a two-way radio. She was told only to take messages. Schulz has testified that she was humiliated, embarrassed, and scared by all of these actions.

On May 16, 1990, Schulz was placed on indefinite probation for violating personnel policy, specifically, for going out of the chain of

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[5]This last warning was in response to Schulz' having gone straight to a City Commissioner with her complaints.

command with her complaints and for insubordination.[6] On August 13, 1990, Hawkins informed Schulz by memorandum that, due to budget constraints, her position would be eliminated effective October 1, 1990. On September 18, 1990, Schulz signed retirement papers, effective September 30, 1990. Defendants contend that Schulz' age did not have anything to do with the fact that her job position was eliminated. They also contend that if Schulz had accepted the other job positions offered her, she could still be working for the City of Vernon. They further contend that they would have terminated a younger employee for the same violations of personnel policy committed by Schulz and that the only reason these steps were not taken was because Schulz was a long time employee with the City.

No one has actually filled Schulz' Warehouse position, because her prior position no longer exists. Rather, Ms. Alaniz now performs both what used to be her own duties and what used to be Schulz' duties. Even though Alaniz is the only remaining Warehouse

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[6]Schulz claims that she didn't know that going outside of the chain of command is a violation of personnel policy. However, Hawkins claims that not only was this policy in the personnel manual and that he told all employees of this policy, but that he had told her at their earlier meeting that going outside of the chain of command was a violation of personnel policy.

secretary, she still has between 25% and 50% of her time free.

II. STANDARD OF REVIEW

Summary judgment is proper when the record establishes that no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Hill v. London, Stetelman & Kirkwood, Inc., 906 F.2d 204, 207 (5th Cir. 1990). The evidence in the record is to be viewed in the light most favorable to the nonmoving party. Newell v. Oxford Management Inc., 912 F.2d 793, 795 (5th Cir.), reh'g denied, 918 F.2d 484 (1990); Medlin v. Palmer, 874 F.2d 1085, 1089 (5th Cir. 1989).

In order to prevail on a motion for summary judgment, the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Thibodeaux v. Torch, Inc., 858 F.2d 1048, 1050 (5th Cir. 1988); Fed. R. Civ. P. Rule 56(c). The party moving for summary judgment need not produce evidence showing the absence of a genuine issue of material fact with respect to an issue on which the

nonmoving party bears the burden of proof. Celotex Corp. v. Catrett, supra; Teply v. Mobile Oil Corp., 859 F.2d 375, 379 (5th Cir. 1988). Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.d.2d 538 (1986); Anderson, 477 U.S. at 257.

In making its determination on the motion, the Court must look at the full record including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Williams, 836 F.2d at 961; Fed. R. Civ. P. Rule 56(c). All reasonable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion and any doubt must be resolved in his favor. Matsushita, 106 S. Ct. at 1356-57; Meyers v. M/V Eugenio, 842 F.2d 815, 816 (5th Cir. 1988). However, the Court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

III. DISCUSSION

Defendants have moved for summary judgment on all of Plaintiff's claims. Plaintiffs have abandoned their state law claims of intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent hiring, retention, an(sic) supervision of Marshall Pylant.[7] They have also abandoned any and all claims against individual Defendants Pylant and Hawkins. Therefore, there is no need for the Court to rule on these issues. The only issue still pending before the Court, then, is whether summary judgment should be granted on Plaintiff's ADEA claim against the City of Vernon.

Defendants seek summary judgment on the following theories: that Plaintiff's cause of action is barred by the statute of limitations, that Plaintiff voluntarily retired and was not discharged or constructively discharged, that Plaintiffs have not shown sufficient evidence to sustain a claim of age discrimination, and that Defendants Hawkins and Pylant are immune from suit under the doctrine of qualified immunity, and that the City of Vernon is immune from suit as a matter of law.

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[7] See Plaintiff's Response to Defendants' Motion for Summary Judgment.

A. IMMUNITY ISSUES

Since Plaintiffs have abandoned their claims against Pylant and Hawkins individually, it is not necessary to determine whether they are immune from suit. The City of Vernon is the only remaining Defendant. In 1974, Congress expanded the scope of ADEA to include state and local employers by expanding the term "employers" to include such parties. 29 U.S.C. § 630(b); see also Lehman v. Nakshian, 453 U.S. 156, 166 (1981). The Supreme Court has determined that the inclusion of state and local governments is a valid exercise of Congress' powers under the commerce clause. E.E.O.C. v. Wyoming, 460 U.S. 226 (1983). Defendant City of Vernon is not immune from suit under the ADEA. Therefore, it is hereby ORDERED that Defendant's Motion for Summary Judgment based on the argument that Defendant is immune from suit is hereby DENIED.

B. THE SUFFICIENCY OF EVIDENCE ON THE ISSUE OF WHETHER DEFENDANT VIOLATED THE ADEA

There is a three part evidentiary procedure for discrimination cases. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (applying test from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to age discrimination cases). First, the

plaintiff must establish a prima facie case. Burdine, 450 U.S. at 252-53. Once a prima facie case is established, then the defendant must articulate a legitimate, non-discriminatory reason for its action. Id. at 253. When an employer articulates legitimate, non-discriminatory reasons for a termination decision, the presumption of discrimination created by the prima facie case is dispelled. Bohrer v. Hanes Corp., 715 F.2d 213, 218 (5th Cir. 1983), cert. denied, 465 U.S. 1026 (1984). Finally, the plaintiff must prove with substantial evidence that the non-discriminatory or non-retaliatory reasons offered by the defendant are not the true reasons for his actions, but merely a pretext. Id. at 253; Reeves v. General Foods Corp., 682 F.2d 515, 521 (5th Cir. 1982).

Defendants argue that Plaintiff has failed to make a prima facie case of discrimination based on age. They further argue that, alternatively, if it is determined that Plaintiff has established a prima facie case, that they have provided evidence which shows non-discriminatory reasons for elimination of Plaintiff's job position, and Plaintiff has failed to show that such reasons are pretextual.

Defendants have provided evidence that Plaintiff's warehouse secretary position was eliminated for budgetary reasons, and it is well-established that Schulz' former position no longer exists.

In a reduction in force case, a plaintiff must show: (1) that she is within the protected age group and has been adversely affected, e.g. discharged or demoted; (2) that she was qualified to assume another position at the time she was discharged; and (3) she must produce evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633 (5th Cir. 1985).

There is a dispute as to whether or not Schulz' retirement was voluntary or whether it was a "constructive discharge." The test is whether the working conditions were so difficult or unpleasant that a reasonable person in Schulz' shoes would have felt compelled to resign. McKethan v. Texas Farm Bureau, 996 F.2d 734 (5th Cir. 1993). There is summary judgment evidence that Schulz felt that retirement was her only realistic alternative. The reasonableness of this assessment, however, is doubtful.

Many of the usual factors in a constructive discharge situation are not present here: Plaintiff was not demoted, her compensation was not diminished, and the duties asked of her were not objectively inconsistent or more onerous than her usual duties. See id. Although there was an attrition of Plaintiff's duties, Defendants have

shown just cause for this. The ability of the Defendant to show legitimate reasons for this attrition distinguishes this case from Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991), cited in Plaintiff's Complaint. It is the opinion of the Court, that Plaintiff was not constructively discharged.

Additionally, Plaintiff has failed to show that she was qualified for another position that was available at the time she was discharged. Plaintiff asserts that she was qualified for the remaining warehouse secretary job, and "many other secretarial positions throughout the City." However, she has failed to provide sufficient summary judgment evidence to support this assertion.

The assertion that she was qualified for "many other secretarial positions," without more, is too abstract to provide sufficient summary judgment evidence that she was qualified for those positions. The Court cannot determine if Plaintiff was qualified if the Plaintiff has not outlined what the positions required or if such positions were available.

Plaintiff has also failed to provide sufficient summary judgment evidence to show that she was qualified for the warehouse secretary position, once it was performed by only one person. The deposition of Alaniz, who presently holds the warehouse secretary

position, reveals that she does in four working hours, what used to take Plaintiff eight working hours. Alaniz now does what both she and Schulz used to do. On the other hand, Schulz said that her former duties as warehouse secretary were a full-time job. Additionally, her affidavit reveals that when Alaniz was on maternity leave and Schulz had to perform both her an Alaniz' duties, she did most of the duties, but did not have enough time to do purchase order and pay bills.

It appears from the summary judgment evidence that Schulz could not perform all of the duties of present warehouse secretary position, and thus she has not shown that she was qualified for that position. Additionally, she resigned, and has not shown that she was discharged by Defendants. Therefore, it is the opinion of the Court that Schulz has failed to establish a prima facie case of age discrimination.

Even if the Court were to conclude that Plaintiff has established a prima facie case of discrimination, however, the Defendant has set forth several non-discriminatory reasons for Plaintiff's discharge. Defendant has provided summary judgment evidence that Schulz had a serious personality conflict with her

supervisor[7][sic], that she repeatedly answered "we'll see" or "maybe" when her supervisor asked her to perform certain duties, and that she violated personnel policies.

In sum, Schulz violated personnel policy, she exhibited significant insubordinate behavior, she refused to accept other positions that were offered to her, and she refused to learn computer skills. Further, Defendants have shown that Alaniz is better qualified than Schulz insofar and she did not have the serious personality conflict with her supervisor that Schulz did, she exhibited superior flexibility in learning new tasks and taking on added responsibility,[8] she possessed computer skills, and she now performs not only her own former duties but the former duties of Schulz as well, even though Schulz described her own duties as a full-time job.

Since Defendants have supplied evidence setting forth several non-discriminatory reasons for the actions taken in regard to Schulz' employment, Plaintiff may only survive a summary judgment

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[7][sic] No other employees have complained about Pylant.

[8] For example, in September of 1988 when the Finance Office Clerk resigned, Schulz was asked if she would take on the duties of generating purchase orders, processing invoices, and paying them as they were due. Defendants contend that as soon as Schulz heard that a computer would be involved, she refused the assignment. Defendants offered to train her accordingly, but she refused. Alaniz accepted the work.

motion if she can provide evidence that these reasons are merely a pretext, and that Plaintiff was discharged because of her age. In order to make a colorable claim under the ADEA, a Plaintiff must establish the existence of discreet facts that show some nexus between the employment action taken by the employer and the employee's age. The Plaintiff's bald assertion that a connection exists simply will not suffice. Moore v. Eli Lilly & Co., 990 F.2d 812, 819 (5th Cir. 1993).

Schulz has not put forth any summary judgment evidence which would indicate a nexus between her age and the employment actions taken in regard to her, even if such actions are characterized as an elimination of her job position or a "constructive discharge." Plaintiff has only provided assertions that she was discharged because of her age.[9] "[T]estimony by an employee regarding [her] subjective belief that [her] termination resulted from age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory reason for [her]

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[9] For example, on April 25, 1990 and on August 24, 1988, Schulz received a letter from the City Manager's office informing her that she would become or was eligible for retirement before January 1, 1990, and requesting that she designate beneficiaries. She asserts that this shows the Defendants discriminatory intent. However, this was standard office procedure, and the Court finds no discriminatory intent in these actions.

release." Molnar v. Ebasco Constructors, Inc., 986 F.2d 115 (5th Cir. 1993).

"The salutary function of summary judgment in the employment discrimination arena is that summary judgment allows apparently meritless cases to be nipped in the bud [w]here there is only an `attenuated possibility that a jury would infer a discriminatory motive.'" Amburgey v. Cohart Refractories Corp., Inc., 936 F.2d 805, 814 (5th Cir. 1991), citing Thornbrough, 760 F.2d at 645 n.19. Such is the case here. Plaintiff has failed to establish a prima facie case of discrimination. Alternatively, Plaintiff has failed to show that the non-discriminatory reasons given by Defendants for elimination of Plaintiff' position are pretextual. Thus, Plaintiff has failed to provide evidence which would allow her to survive a summary judgment motion. Therefore, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED**.

C. STATUTE OF LIMITATIONS

Even if the Defendants had not been successful on the merits, the Court would alternatively grant summary judgment because Plaintiff's claim are time-barred. In an ADEA claim, the cause of action accrues when Plaintiff knows or should have known of that an adverse an discriminatory employment decision has been

made, rather than on the final date of employment. See, Delaware State College v. Ricks, 449 U.S. 250 (1980); Clark v. Resistoflex Co., 854 F.2d 762, 765 (5th Cir. 1988). Thus, this action accrued August 13, 1990, when Schulz was informed that her job position would be eliminated.

Plaintiff's Complaint asserts that Plaintiff's cause of action falls under the two year statute of limitations of the ADEA as prescribed in 29 U.S.C. § 626 (e) (1) and 29 U.S.C. § 255 (a). Clearly, if the two year statute of limitations were to apply, Plaintiff's cause of action would be barred, since the cause of action would be barred, since the cause of action accrued more than two years before Plaintiff filed this suit. However, the Portal-to-Portal statute on which the ADEA relies for its statute of limitations provides that where violations are "willful" a three year statute of limitations will apply. 29 U.S.C. § 255(a).

Although Plaintiff did not specifically allege that Defendants' violation were willful in that part of her Complaint which alleges violations of the ADEA, she did allege willful conduct in that part of the Complaint which seeks exemplary damages. Although exemplary damages are not available under the ADEA, liquidated damages are. See, 29 U.S.C. § 625. Plaintiff's request for

exemplary damages should be considered liquidated damages, since liquidated damages under the ADEA are considered punitive in nature, and since both types of damages are only available where the defendant was willful in violating the statute. See Cash v. Jefferson, 978 F.2d 217 (5th Cir. 1992).

Even if the Court considers the Plaintiff's Complaint to allege a three-year statute of limitations claiming willfulness, however, the Plaintiff has failed to provide any summary judgment evidence indicating that the Defendant's action was willful. A violation is willful "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[10] Transworld Airlines v. Thurston, 469 U.S. 111, 133 (1985); Powell v. Rockwell Intn'l Corp., 788 F.2d 279 (5th Cir. 1986).

There is no summary judgment evidence before the Court which indicates that the City of Vernon, through its employees, Hawkins and Pylant acted willfully in violating the ADEA. Therefore

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[10] Plaintiff also claims that this standard includes willfulness where the employer "should have known" that the actions taken violate the ADEA, and cites Powell specifically states that the Supreme Court's decision in Thurston, "remove[d] the characterization of `willful' from violations when the defendant merely `should have known' his actions would violate the law." Powell, 788 F.2d at 285. The Court points out to counsel, not only is a mischaracterization highly unethical, it subjects counsel to the possibility of sanctions.

the two-year statute of limitations would apply to this case. Since suit was not filed within two years of the date on which Plaintiff knew or should have known of the Defendant's allegedly discriminatory intent, this suit is barred by the statute of limitations. Therefore, it is **HEREBY ORDERED** that Defendants' Motion for Summary Judgment is hereby **GRANTED** on the ground that this suit is barred by the statute of limitations.

Therefore, it is **ORDERED** that Defendants' Motion for Summary Judgment is hereby **GRANTED**. A Judgment in compliance with this Memorandum Opinion and Order shall be entered this same date.

It is **FURTHER ORDERED** that the Clerk of the Court close this case.

IT IS SO ORDERED.

SIGNED this 19th day of April, 1994.

DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10479
Summary Calendar

HEDWIG R. SCHULZ a/k/a
Hedy Schulz,

Plaintiff-Appellant,

versus

CITY OF VERNON, PAUL HAWKINS,
Individually and as Agent, Servant,
and Employee for the City of Vernon,
and MARSHALL PLYANT, Individually
and as Agent, Servant, and Employee
for the City of Vernon,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(7:92-CV-107)

Before POLITZ, Chief Judge, GARWOOD and PARKER, Circuit Judges. POLITZ, Chief Judge:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-

Hedwig R. Schulz appeals the dismissal of her age discrimination suit against her employer, the City of Vernon, Texas. Finding no error, we affirm.

Background

Schulz had been employed as a warehouse secretary for the City of Vernon for over a decade when, in January 1990, the other warehouse secretary made known her plans to take a six-week maternity leave. Because Schulz was 66 years old and eligible for retirement her supervisors inquired if she intended to retire during the other secretary's absence. Schulz refused to disclose her plans, stating that she might wait until the other secretary was on leave and then not report for work. Schulz was reprimanded for this behavior and reminded that retirement required submission of papers no less than 30 days in advance.

Schulz admits to embarking on a course of insubordinate behavior which, coupled with errors and tardiness in her work,

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settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

resulted in a change in her work assignments. Schulz complained bitterly of the changes and was told that all City employees had taken on new responsibilities. She was also cautioned to improve her attitude. Subsequently, she was offered a transfer to another position that involved familiar clerical tasks but, after a mere two-day trial period she advised that she could not perform the new job because of its complexity and the physical discomfort it caused.[1] The City reinstated Schulz to her former position as warehouse secretary.[2]

Upon return to the warehouse the only task assigned Schulz was the taking of messages. Shortly thereafter she was placed on indefinite probation for violation of personnel policy by continuing to go outside the chain of command with her complaints, despite express instructions to the contrary, and for insubordination. On August 13, 1990, Schulz was informed that, effective October 1, 1990, her position would be eliminated due to budget constraints.

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[1]The job required Schulz to input figures at a computer terminal. She claimed that she could not learn such basic computer skills; further, she claims that sitting at a terminal strained her sciatic nerve, although she failed to distinguish how sitting at the terminal was any different from sitting at her desk in the warehouse.

[2]Schulz's retirement was discussed but because of insurance costs she decided not to retire. The City Manager assured her that he was making

One month later Schulz signed retirement papers effective September 30, 1990.

Schulz filed a charge of discrimination with the EEOC; her claim was denied and the instant suit was filed alleging that the City of Vernon had violated the ADEA[3] by a constructive discharge. The district court granted summary judgment in favor of the City, noting that her claims were barred both by limitations and the City's providing of legitimate, nondiscriminatory reasons for its actions. Schulz timely appealed.

Analysis

A grant of summary judgment is reviewed *de novo* under the same standard as that applied by the district court. Summary judgment is required when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[4]

Schulz contends that the court erred in granting summary judgment based on the passage of the two-year limitations period;

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every effort to continue her employment.

[3]29 U.S.C. Sec. 621, *et seq.*

she instead argues that, as the violations were willful, a three-year limitation period was applicable.

ADEA claims have a two-year limitation period; however, if the violation is willful, the period is extended to three years.[5] In order to show a willful violation of the ADEA, an employee must show that her employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[6] Schulz, however, has failed to demonstrate sufficient evidence that a violation of the ADEA occurred, much less the existence of a willful violation.

The typical unfolding of an ADEA claim requires that the plaintiff first present a *prima facie* case of age discrimination, after which the defendant is given an opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision.[7] If such a reason is forthcoming, the plaintiff has the burden of persuading the trier of fact that the explanation was pretextual and that the real reason was age discrimination.[8]

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[4]Lindsey v. Prive Corp., 987 F.2d 324 (5th Cir. 1993).

[5]29 U.S.C. Sec. 626(e) (1); 29 U.S.C. Sec. 255(a).

[6]Transworld Airlines. Inc. v. Thurston, 469 U.S. 111,128 (1985).

[7]McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The ultimate issue in the instant summary judgment motion is whether the evidence of the existence or absence of willful discrimination is so compelling that one party should prevail as a matter of law.[9] In the event that "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant,"[10] summary judgment dismissing Schulz's claims would be appropriate.

The evidence of record overwhelmingly demonstrates that Schulz was not terminated because of her age but because of her attitude and grossly unacceptable work performance. The City made several efforts to continue her employment,[11] despite blatant acts of insubordination, and offered her different positions.[12] None met with Schulz's favor.

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[8]Lindsey.

[9]Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[10]Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

[11]As she spent much of her time idle while working at the warehouse, Schulz was told to report for the clerical position in City Hall. She refused and when to do so she challenged her supervisor and then violated personnel rules by complaining directly to the City Manager.

[12]In addition to the position at City Hall entering meter readings into a computer, Schulz was offered a position as a dispatcher but declined it, refusing to work at night.

The record also shows that the City was actively engaged in reducing its workforce, eliminating or combining 13 other jobs. The reasons assigned for terminating Schulz, including her inability to get along with her supervisors, her insubordination, unwilling-ness or inability to perform other tasks, plus the fact that two secretarial positions were not needed in the warehouse, were neither contrived nor pretextual. The summary judgment record clearly reflects a failure of proof of age discrimination.

The judgment appealed is AFFIRMED.